

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

March 6, 2012

In the Matter of CARTER, Minors.

No. 304476

St. Clair Circuit Court

Family Division

LC No. 09-000585-NA

Before: JANSEN, P.J., and WILDER and K.F. KELLY, JJ.

PER CURIAM.

Respondent appeals as of right the trial court's order terminating her parental rights to her minor two children under MCL 712A.19b(3)(c)(i) (conditions of the adjudication continue to exist), (c)(ii) (other conditions exist that cause the child to come within the court's jurisdiction), (g) (failure to provide proper care or custody), and (j) (likelihood of harm). We reverse.

I. BASIC FACTS

On December 17, 2009, the trial court entered an order taking respondent's children into protective custody, stating, "There is domestic violence in the home and it is escalating today. There are substance abuse concerns as [the child] was born positive for marijuana and mother continues to use it." On December 23, 2009, petitioner filed a petition for the court to take jurisdiction over the children and remove them from respondent's home. The petition alleged that the domestic violence and respondent's drug use posed safety concerns.

At a February 3, 2010, hearing, respondent, the custodial parent, made a no-contest plea to the allegations in the petition. The trial court then issued an order taking jurisdiction over the children. The order required respondent and the children's father to comply with the case service plan and stated that parenting time would be coordinated by the foster care worker assigned to the case.

In preparation for a dispositional review and permanency planning hearing on March 29, 2010, DHS submitted a report to the court outlining the parents' compliance with the case service plan. The report stated that respondent had attended three anger management sessions but had refused to participate in parenting classes and random drug screens. She had completed psychological testing on March 3, 2010, as well as a substance abuse screening and assessment on March 9, 2010. Respondent also underwent a psychological evaluation on March 11, 2010. The evaluator recommended that, if and when respondent had a desire to stop smoking marijuana, she should attend Narcotics Anonymous, participate in individual counseling, and

take drug screens. In light of respondent's refusal to participate in random drug screens and her lack of compliance with other court orders, DHS suspended her parenting time and requested that it remain suspended. The court ordered that the parenting time of both parents remain suspended until "three consecutive random drug screens are completed over a period of three weeks and those results are negative for any substance use."

Respondent completed her parenting and anger management classes in June 2010. And according to the caseworker's testimony, respondent's drug screen results from 2010 are as follows:

- May 13, 2010: clean
- May 27, 2010: diluted (treated as positive)
- June 2, 2010: clean
- June 18, 2010: clean
- June 25, 2010: positive
- July 1, 2010: positive
- July 15, 2010: clean
- July 25, 2010: missed (treated as positive)
- August 3, 2010: clean
- August 10, 2010: clean
- August 30, 2010: positive¹
- September 16, 2010: clean
- September 21, 2010: clean
- September 28, 2010: missed (treated as positive)

For reasons that are unclear from the record, there were no screens on file from October 2010 through January 2011. Because of respondent's purported three, consecutive clean drug

¹ The caseworker's testimony did not reference a screen in between August 10 and August 30, but other evidence suggests that respondent tested clean during this time, thus meeting the three consecutive clean screen condition for visitation.

screens in August 2010, she was allowed parenting time with the children starting on August 26, 2010. However, just days after, she tested positive and her parenting time was again suspended.

The trial court held additional dispositional review and permanency planning hearings on November 29, 2010, and February 22, 2011, and DHS again filed reports in preparation for the hearings. According to the reports, at the time of the first hearing in November 2010, both parents had not yet participated in relationship counseling. Respondent had not participated in a domestic violence support program and had not appeared for any drug screens since September 2010. She attended two substance abuse counseling sessions with Gary Montgomery but angrily stormed out of each session. Montgomery reported being concerned that the parents were not taking responsibility for their actions and had careless attitudes. By the time of the February 22, 2011, hearing, however, respondent had reported to DHS that she was pregnant and that, as of January 19, 2011, was no longer in a relationship with the father. She reported that “she finally realized that domestic violence was a problem in their relationship.” Respondent had attended three substance abuse counseling sessions with a different counselor and had completed a random drug screen on February 3, 2011, which was negative. It was her first recorded screen since September 2010.

After the February 22, 2011, hearing, the court granted DHS “permission to file a petition to terminate the parental rights of both parents due to lack of substantial progress over a 12 month time frame.” Thereafter, DHS filed a supplemental petition to terminate the parental rights of both parents. At the recommendation of DHS, the court ordered that parenting time remain suspended pending the outcome of the termination hearing, despite the fact that respondent had three, consecutive clean drug screens in February and March 2011. The results of the 2011 drug screens are as follows:

- February 3, 2011: clean
- February 15, 2011: clean
- February 22, 2011: clean
- March 1, 2011: clean
- March 16, 2011: missed (treated as positive)
- March 29, 2011: (screen not completed because respondent did not have money to pay)
- April 4, 2011: missed (treated as positive)
- April 5, 2011: clean
- April 11, 2011: missed (treated as positive)

On April 27, 2011, a termination hearing was held in front of a referee. At the hearing, DHS foster care specialist Ashley Asman testified, *inter alia*, regarding respondent’s substance

abuse. She stated that, in approximately January 2011, respondent began attending counseling with a different therapist. The therapist indicated to Asman that respondent was progressing well, although she still did not recognize that her marijuana addiction was a problem and she had not followed the therapist's recommendation to attend group therapy. Asman testified that, because of respondent's inability to consistently pass three consecutive drug screens, respondent was only able to have one session with her children over the course of the proceedings, which took place in August 2010. Asman acknowledged respondent's recent clean screens but testified that, given respondent's history and attitude regarding marijuana use, she was skeptical that respondent would remain drug free without CPS involvement.

Asman also testified that she thought termination was in the children's best interests because of the limited amount of parenting time that had occurred and the lack of a bond between the parents and children. She stated that she "would fear for the safety of the children being that both parents have not completely accepted their drug usage and how it could affect the safety of their children." Additionally, according to Asman, the father was charged with domestic violence for an incident between him and respondent in March 2010. Neither parent had recognized that domestic violence was a problem in their relationship until January 2011, when respondent reported to DHS that she was no longer in a relationship with the father. But Asman was unconvinced of such a claim because she was informed by another case worker that the two were seen holding hands in public.

Respondent testified that she was living in an apartment and that the father did not live with her, although he visited her there on the weekends. He occasionally spent the night, but respondent did not consider him to be her boyfriend. There had been no domestic violence between them since the incident in March 2010. Respondent had participated in domestic violence treatment in January and February 2011, and she believed it was helpful. She testified that she had been attending individual counseling since December 2010 and had been free of marijuana since January 2011. Respondent also acknowledged on cross-examination that she again was pregnant with the father's child. In regard to employment, respondent testified that she had been working as a part-time customer service representative since March 2010, making \$1,150 per month. She had also been attending school. Respondent believed that her housing situation was now stable and that she was fully capable of successfully parenting the children.

At the conclusion of the termination hearing, the referee made no findings, taking the matter under advisement. Thereafter, the referee issued a recommendation that the parental rights of both parents be terminated under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j). The recommendation primarily focused on the parents' drug use:

The evidence at trial established that the primary issue in the case was the parents['] continued abuse of marihuana. . . .

* * *

Respondent mother testified that she has been clean of marihuana since January 2011. Her testimony is supported by the fact that she had three negative drug screens in February 2011, with the final screen being completed on February 22, 2011. However, as previously noted, that was the same date as the

permanency planning hearing in which the Court authorized the filing of the termination petition. At that point, the parents had not had visitation with their children for most of the previous year. Without visitation, there could be no real progress towards a reunification plan. The suspensions of parenting time were the direct results of the parents['] numerous positive drug tests and/or their disregard and failure to complete requested drug screens.

* * *

The parents were unable to make any significant progress towards reunification during the year[-]long period of temporary court wardship. As stated, this was due primarily to their continued use of marihuana based upon positive drug screens and/or their failure to take requested drug screens. There has been no significant change in the circumstances which led to the original adjudication. Based on the evidence presented, the Court finds that there is clear and convincing evidence to terminate the parental rights of [both parents] pursuant to MCL 712A.19b(3)(c)(i)(ii), (g), and (j).

The probate court subsequently entered an order, which terminated the parents' parental rights. But the order lacked any findings of fact or analysis. Instead the order merely stated that the court found "by clear and convincing evidence" that each of the statutory requirements of MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j) were met, without explaining how or what particular facts met the requirements. Since the order referenced the referee's recommended findings of fact and conclusions of law, we will presume that the probate court was adopting those findings and conclusions as its own.

II. ANALYSIS

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been met by clear and convincing evidence. MCL 712A.19b(5); *In re Sours*, 459 Mich 624, 632; 593 NW2d 520 (1999). "Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *In re Trejo*, 462 Mich 341, 353; 612 NW2d 407 (2000), see also MCL 712A.19b(5). We review for clear error a trial court's factual findings, its determination that a statutory ground for termination of parental rights has been proved by clear and convincing evidence, and its best interests determinations. MCR 3.977(K); *In re Trejo*, 462 Mich at 356-357. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

Evidence is clear and convincing when it produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. [*In re Martin*, 450 Mich 204, 227; 538 NW2d 399 (1995) (internal quotation marks omitted, brackets in original).]

In this case, respondent's parental rights were terminated under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j), which provide:

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

A. MCL 712A.19b(3)(c)(i)

In regard to MCL 712A.19b(3)(c)(i), the conditions that led to the trial court taking jurisdiction over the children were (1) domestic violence between the respondent mother and the children's father and (2) respondent's drug use. Thus, in order for termination of parental rights to be proper under this subsection, the court must have found that either (1) the risk of domestic violence continued to exist and there was no reasonable likelihood that the risk would be rectified within a reasonable time, or (2) respondent's drug use continued to exist and there was no reasonable likelihood that the use would be rectified within a reasonable time.

Regarding the risk of domestic violence, the referee did not make any relevant findings because she determined that "[t]he evidence at trial established that the primary issue in the case was the parents['] continued abuse of marihuana." Thus, it is clear that the court did not rely on any risk of domestic violence in making its determination that respondent's parental rights

should be terminated.² As a result, if termination of respondent's parental rights is to be supported by MCL 712A.19b(3)(c)(i), it must be because of her continued use of marijuana.

Regarding respondent's drug use, the referee's finding of facts included the following:

Respondent mother testified that she has been clean of marihuana since January 2011. Her testimony is supported by the fact that she had three negative drug screens in February 2011, with the final screen being completed on February 22, 2011. However, as previously noted, that was the same date as the permanency planning hearing in which the Court authorized the filing of the termination petition. At that point, the parents had not had visitation with their children for most of the previous year. Without visitation, there could be no real progress towards a reunification plan. The suspensions of parenting time were the direct results of the parents['] numerous positive drug tests and/or their disregard and failure to complete requested drug screens.

From the above excerpt, it is clear that the referee relied on the fact that respondent lacked parenting time during the previous year. But this fact is not relevant to MCL 712A.19b(3)(c)(i)'s requirement of finding that the condition that led to the adjudication (respondent's marijuana use) continued to exist and that there was no reasonable likelihood that the condition would be rectified within a reasonable time. In fact, the referee's earlier statement acknowledges that the evidence supported respondent's claim that she had been drug free since January 2011. Additionally, the record shows that respondent never truly tested positive in any drug screen in 2011.³ Therefore, to the extent that the referee found clear and convincing evidence that respondent's drug use continued to exist and would not be rectified in a reasonable amount of time, that finding is clearly erroneous. The only evidence suggesting that respondent was still abusing marijuana at the time of the termination hearing was the fact that she had four missed screenings in March and April 2011. But this evidence was opposed by not only respondent's own testimony but also her counselor and DHS caseworker, who both agreed that she was making progress on her drug addiction. Thus, we are left with a definite and firm conviction that the trial court erred when it found that respondent's drug use continued to exist and would not be rectified within a reasonable time. Accordingly, respondent's parental rights could not have been terminated under MCL 712A.19b(3)(c)(i).

² Given that both respondent and the children's father completed all provided services related to domestic violence, it is no wonder that the court did not rely on domestic violence as a justification for terminating respondent's parental rights.

³ Specifically, respondent had nine drug screens in 2011, spanning from February 3 through April 11. Respondent tested "clean" in five of them and failed to participate in the screening four times (we note that DHS usually considers missed tests as positive results for its administrative purposes). However, it was likely that respondent would have also tested clean for the March 16, March 29, and certainly the April 4 screens because she actually tested clean on April 5. See *People v Feezel*, 486 Mich 184, 215; 783 NW2d 67 (2010) (acknowledging expert testimony stating that marijuana can stay in person's urine for up to four weeks).

B. MCL 712A.19b(3)(c)(ii)

The referee's recommendation did not explicitly state what "other conditions" he found to exist that satisfied the statutory requirement of MCL 712A.19b(3)(c)(ii). However, given the referee's statements pertaining to respondent's lack of visitation and bonding with the children, we read this as the "other condition."

During the year leading up to the termination hearing, respondent only had one visit with her children. Thus, the trial court finding that respondent had essentially no contact with the children, and thus no bonding, is not clearly erroneous. However, the statute also requires that there not be a reasonable likelihood that this "other condition" will be rectified within a reasonable amount of time. Here, there was no evidence produced that the lack of bonding could not have been rectified within a reasonable amount of time. The only reason that respondent did not have parenting time with the children was because of her failure to meet the court-imposed requirement of passing three consecutive drug screens. But as we noted, *supra*, respondent was showing progress in her drug use. In fact, respondent successfully tested "clean" in four consecutive drug screens from February 3, 2011, through March 1, 2011. Thus, respondent could have resumed visitation under the drug-screen requirements provided. But, only because the petition to terminate her parental rights was submitted at the time of her third consecutive "clean" screen, visitation/parenting time was not permitted. Respondent did not challenge in the trial court the legality of the practice in St. Clair County to require three clean drug screens as a precondition for parenting time with the minor children, and respondent's counsel represented to this Court that this policy is no longer in effect, so we do not specifically address it here.⁴ Nevertheless, we find that the trial court clearly erred when it determined that the lack of bonding was not rectifiable within a reasonable amount of time. The evidence suggested that respondent was trending towards being able to have parenting time and, in fact, tested clean four consecutive times in early 2011. There was no evidence presented at the hearing to support finding that the lack of bonding could not be rectified in a reasonable amount of time, let alone evidence of a clear and convincing nature. Therefore, the trial court erred when it terminated respondent's parental rights under MCL 712A.19b(3)(c)(ii).

⁴ We do note, however, that a trial "court *shall* permit the juvenile's parent to have frequent parenting time with the juvenile. If parenting time, even if supervised, may be harmful to the juvenile, the court shall order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and the conditions of parenting time." MCL 712A.13(11) (emphasis added). As such, parenting time can only be conditioned if the visitation may be harmful for the child and after the child undergoes a psychological evaluation and/or counseling. See *In Re Mason*, 486 Mich 142, 163 n 13; 782 NW2d 747 (2010). Therefore, a blanket policy that conditions parenting time, including supervised parenting time, upon three consecutive negative drug screens, without following the statutory framework, would be contrary to Michigan law.

C. MCL 712A.19b(3)(g) and (j)

The trial court stated that it found that the grounds for termination set forth in MCL 712A.19b(3)(g) and (j) were met by clear and convincing evidence. MCL 712A.19b(3)(g) requires a court to terminate parental rights when a parent “fails to provide proper care and custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child’s age.” And MCL 712A.19b(3)(j) permits a court to terminate parental rights when “[t]here is a reasonable likelihood, based on the conduct or capacity of the child’s parent, that the child will be harmed if he or she is returned to the home of the parent.”

Unfortunately, the referee’s recommendation, which the trial court seemingly adopted, did not reference what fact or facts it determined to exist that satisfied these statutory requirements. Thus, we conclude that finding that these statutory requirements were met by a clear and convincing standard is necessarily clearly erroneous. And if the referee did intend to rely on respondent’s drug use as a basis for meeting subsections (g) and (j), since the drug use was the main justification for the recommendation, we determine that finding to be clearly erroneous too. Aside from the progress that respondent was exhibiting with respect to her marijuana use, discussed *supra*, there was no evidence that said drug use contributed to respondent’s inability to provide the proper care and custody for the children, MCL 712A.19b(3)(g), and there was no evidence that respondent’s drug use created a reasonable likelihood that the children would be harmed if returned to her, MCL 712A.19b(3)(j).

D. BEST INTEREST

In light of our conclusion that petitioner failed to establish any of the statutory factors by a clear and convincing standard, we need not consider the referee’s analysis of the children’s best interests under MCL 712A.19b(5). *In re JK*, 468 Mich 202, 214-215; 661 NW2d 216 (2003).

Reversed.

/s/ Kurtis T. Wilder

/s/ Kirsten Frank Kelly